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December 20, 2007

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Thomasenia P. Duncan
General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: MUR 5952; Hillary Clinton for President and Shelly Moskwa, as Treasurer

Dear Ms. Duncan:

This response is submitted on behalf of our client, Hillary Clinton for President (the "Committee") and Shelly Moskwa, as Treasurer, to the complaint filed in the above-captioned Matter Under Review ("MUR"). For the reasons stated below, the Committee respectfully requests that the Commission find no reason to believe that any violation of the Federal Election Campaign Act of 1971 ("Act"), as amended, or of the Commission's regulations, has occurred and close this matter as expeditiously as possible.

- 1. The Complaint is deficient in form as a matter of law under the Commission's regulations and must be dismissed for this reason.**

The Commission has failed to take note that the complaint suffers from a basic procedural deficiency which compels its immediate dismissal. The complaint is not adequately notarized as required by Commission regulations at 11 C.F.R. 111.4. While there is a notary statement attached to the complaint, the notary public failed to sign the statement, either on the signature line or elsewhere.¹ Under California state law, because the notary failed to sign and complete the notary statement, the complaint is not considered to have been notarized as required by 11 C.F.R. 111.4, and therefore, is procedurally deficient and must be dismissed on these grounds alone.

¹ Under Section 8205 of the California state code, it is the duty of a notary public to give a certificate of proof or acknowledgment, endorsed on or attached to the instrument. *The certificate shall be signed by the notary public in the notary public's own handwriting.* Also, a certificate of acknowledgment must be completely filled out at the time the notary public's signature and seal are affixed.

2. **While the Complaint alleges coordination, it fails to provide any information from which an allegation of coordination may even be investigated.**

Should the Commission fail to follow its regulatory requirements and treat this as a valid complaint, the Committee still believes that it must be dismissed. The complaint raises allegations about certain activities of Californians for Fair Election Reform ("CFER"), a committee established in California to oppose a potential ballot initiative.² That initiative has not yet qualified for the ballot, and, in fact, recent press reports have indicated that the initiative is dead and no longer attempting to qualify for the ballot. See, e.g., Exhibit A, Los Angeles Times, *Electoral Measure Fails to Make June Ballot* (December 7, 2007). Regardless, complainant alleges that CFER's activities have been coordinated with the Committee, and, as a result, have caused excessive contributions to the Committee to occur.

As more fully explained below, the Committee believes that, under the Act, the fact that the initiative is now never going to even attempt to qualify for the ballot should be dispositive of this case and must compel dismissal. However, an examination of the facts will also show that complainant's allegation of coordination is demonstrably false. In addition to the complete lack of factual merit to the allegation, there is simply no legal support, under the Act, Commission regulations or Commission Advisory Opinions ("AOs") to support a conclusion of coordination.

As an initial factual matter, it should be noted that CFER was not established by the Committee, either directly or indirectly, and the complaint does not allege anything to the contrary. The Committee has no role with respect to CFER. There are no overlapping officers or staff. The Committee did not provide any funds to CFER and does not control, direct or have any involvement in CFER's day-to-day activities. The same is true for Hillary Clinton. She likewise has no role, formal or informal, with CFER; she does not control, direct or have any involvement with that committee.³ Finally, there is no information, either in the complaint or of which the Committee is aware, that CFER planned, proposed or intended to make any public communications relating to the Committee.

On the other hand, the complaint makes two simple factual allegations: (1) that four (4) contributors to the Committee are also donors to CFER, and (2) that two (2) apparent CFER spokespeople are also "Clinton operatives." The former is irrelevant, and the latter is false.

² The proposed ballot initiative would have altered the manner in which California's electoral votes are awarded from the current winner-take-all method to proportional allocation based on congressional district. CFER supports the current system and opposes this change.

³ While the complaint singles out the Committee as the subject of the allegation, a number of the Democratic presidential candidates expressed public support for CFER's activities, and, in fact, Hillary Clinton was criticized by some CFER supporters for being among the last of those candidates to express support.

a. An allegation of four overlapping contributors is insufficient as a basis to investigate coordination.

The four CFER donors mentioned are, in fact, also contributors to the Committee. However, no provision of the Act or Commission regulation or rule bars overlapping contributors between a principal campaign committee and a state committee supporting or opposing a possible ballot initiative. To the contrary, the Commission has expressly recognized that individuals may contribute to – and may even be more significantly involved in – more than one political effort, even where, as here, one of the efforts may be a federal campaign. See, e.g., AO 2003-10, *In re Rory Reid*, in which the son of a federal candidate was permitted to raise non-federal funds for a state party committee, in his own capacity and not on the authority of any federal candidate, and the Commission concluded that where he did so, “the fundraising activities will not be attributed to any Federal candidate or officeholder for purposes of 2 U.S.C. 441i(e)” *Id* at 5.

In fact, in light of the Bipartisan Campaign Reform Act of 2002 (“BCRA”), the Commission has expressly recognized the capacity of individuals to wear “multiple hats,” meaning the ability to be involved, including in a fundraising capacity, with more than one organization or acting as agent for different organizations. The Commission also made clear that a principal may only be held liable under BCRA for the actions of an agent when the agent is acting on behalf of the principal. Explanation and Justification, 67 Fed. Reg. 49063, 49083 (July 29, 2002). “[I]t is not enough that there is some relationship or contact between the principal and agent; rather, the agent must be acting on behalf of the principal to create potential liability for the principal. This additional requirement ensures that liability will not attach due solely to the agency relationship, but only to the agent’s performance of prohibited acts for the principal.” *Id* at 49082; see also, AOs 2003-3, 2003-36.

In addition, the Commission has recognized that federal officeholders themselves may solicit funds for ballot committees, under certain circumstances. See, e.g., AO 2005-10, discussed more fully below, and see also, AO 2007-28, which, while the rationale of the Commission is still pending the publication of the Commissioners’ reasoning, appears to have reaffirmed this principle this very week. If federal officeholders or candidates may permissibly solicit funds for ballot committees, then certainly contributors may permissibly contribute to both.

Here the four contributors were not acting as agents of the Committee when making their contributions to CFER, and complainant provides no information or evidence to the contrary. They were exercising their capacity to wear the Commission-recognized “multiple hats”. The fact that there may have been four overlapping contributors is simply insufficient as a matter of fact and law to establish either coordinated activity or a violation of the Act.⁴

⁴ The fact that there were four overlapping contributors is also insufficient to establish that CFER was somehow “financed” by the Committee, and complainant makes no such allegation.

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- b. Merely calling someone a campaign operative – where such allegation is demonstrably false – is insufficient as a basis to investigate coordination.***

A similar conclusion is compelled with respect to the two so-called Clinton operatives, who are identified as Chris Lehane and Margie Sullivan. Neither is an agent or representative of the Committee. Neither is an employee of or consultant to the Committee. Neither has received any disbursement from the Committee or has been compensated for any services thereto. Neither is part of the Committee's volunteer program. Finally, neither has been authorized by the Committee to speak on its behalf or take any other action in connection with CFER or the related ballot initiative. None of their public comments indicate any information to the contrary, and complaint provides no other information or evidence to contrary, apart from its unsupported description that Lehane and Sullivan are Clinton operatives. Accordingly, there is simply no information from which to draw this conclusion. The fact that two individuals, who may be individual supporters of Hillary Clinton's candidacy, are also involved with CFER cannot lead to the conclusion that the Committee maintains or controls CFER.

- 3. Inasmuch as the ballot initiative has already failed to qualify for the ballot, there is nothing to coordinate and no basis to investigate coordination.**

Even if the Commission were to determine – despite the information to the contrary – that the alleged facts are sufficient to provide an opportunity for coordination to occur, there is nothing to be coordinated, and therefore, no violation could possibly occur. Since the filing of the complaint, public reports have clearly indicated that the effort to place the initiative at issue on the California ballot has failed and is dead. See, e.g., Exhibit A, Los Angeles Times, *Electoral Measure Fails to Make June Ballot*. The initiative effort never came close to qualifying for the ballot, but, in all actuality, was wishful thinking by some California partisans, amounting to nothing more than a website and a few press releases. By all reports, even the petitioning and signature collection process failed to get off the ground, due to insufficient funding.

Thus, assuming arguendo, that complainant's facts set forth an opportunity for coordination during this period, the fact this occurred *pre-qualification* (for the ballot) should be dispositive of this matter and must compel dismissal of the complaint. The Commission addressed this issue in AO 2003-12, concluding that the activities of a ballot initiative committee that is not "established, financed, maintained or controlled" by a Federal candidate, officeholder, or agent of either, are not "in connection with any election other than an election for Federal office" prior to the committee qualifying an initiative or ballot measure for the ballot.⁵ The Commission's reasoning in 2003-12 is illustrative of the circumstances herein:

⁵ Reserving our right to address and argue this further should the Commission find reason to believe herein, under the Commission's apparent reasoning, during the pre-qualification period there would be no violation of BCRA's fundraising limitations and prohibitions.

Some ballot initiative and referenda questions do not qualify for the ballot and, therefore, never appear before voters on any ballot. There is a clear delineation between pre-ballot qualification activities, such as petition and signature gathering, which do not occur within close proximity to an election, and post-ballot qualification activities, that occur in closer proximity to elections and potentially involve greater amounts of Federal election activity.

All of the activities herein occurred in the pre-qualification period. There does not appear to be any possibility of moving beyond the pre-qualification period. If there is no ballot initiative to speak of, then there is nothing to be supported, or opposed in the case of CFER, and as a result, there is nothing to have been coordinated. It is ludicrous to think that the mere speculation or wishful thinking of a ballot initiative can establish the basis for a violation of FECA or BCRA, when, as here, there is not one iota of information indicating that any activity was intended to influence the nomination or election of Hillary Clinton.

4. **Even the pre-qualification ballot initiative activities fail to provide a sufficient basis to investigate coordination.**

Finally, even if the Commission were to determine that activities related to a non-existent ballot initiative could form the basis for coordination, it is clear that the activities of CFER were not in connection with a federal election.⁶ Published reports indicate that CFER would have been on the ballot on June 3, 2008. No presidential candidates would have been on this ballot. The presidential primary in California will be held on February 5, 2008, and the general election is obviously in November 2008.

In AO 2005-10, the Commission permitted federal officeholders to raise funds for a ballot initiative to be held on a date on which those officeholders were not on the ballot. See AO 2005-10, *In re Berman*, (The Commission concludes that the restrictions on federal candidates and officeholders do not apply to raising money for a ballot initiative committee that was not directly or indirectly established, financed, maintained, or controlled by the candidates and where neither candidate was on the ballot in the election in which the initiative was voted on.) Similarly, here, the putative election is one in which no presidential candidate would be on the ballot.⁷

⁶ We reserve the right to address the issue of whether this particular ballot initiative, if ballot-qualified, would have been deemed "in connection with a federal election" or "in connection with a non-federal election" at all, because we do not believe that the Commission need reach this issue in order to dismiss this matter, for the reasons stated in the response.

⁷ Because separate opinions from the Commissioners explaining the Commission's split-decision in AO 2007-28 are forthcoming, the Committee has not yet had an opportunity to fully review that AO.

There is no evidence to suggest that any of CFER's pre-qualification activities related to the February 5, 2008 presidential primary. As stated earlier, neither the Committee nor Hillary Clinton directly or indirectly established, financed, maintained, or controlled CFER. CFER is not alleged to have made any public communications on behalf of the Committee, and the Committee is not aware of any. Accordingly, there is no basis to investigate whether those pre-qualification activities gave rise to improper coordination with candidates who would not even be on the ballot, had the initiative qualified.

5. Conclusion

For the reasons stated above, the Committee believes that complainant's allegations are without factual or legal merit. There is no evidence for coordination or even for the opportunity for coordination. Most importantly, even if there had been, the activities would have been permitted, under the facts herein, in the pre-qualification period for a ballot initiative that is now dead or all but dead. Accordingly, the Committee respectfully requests that the Commission find no reason to believe that any violation of FECA or BCRA, or of the Commission's regulations, has occurred and close this matter as expeditiously as possible.

Respectfully submitted,

Lyn Utrecht

Lyn Utrecht
Eric Kleinfeld

Counsel for Hillary Clinton for President

Exh.

However, it appears that all Commissioners agreed that the proposal from two federal officeholders to solicit funds for ballot measure committees involved in the qualification and passage of a redistricting ballot initiative was permissible. This, too, will likely lend support for the Committee's request for dismissal of this complaint.

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EXHIBIT A

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Los Angeles Times



<http://www.latimes.com/news/local/la-me-electoral7dec07.1.2460594.story?ctrack=1&cset=true>
From the Los Angeles Times

Electoral vote measure fails to make June ballot

The Republican-backed initiative in California, which could have thrown the GOP presidential nominee, did not garner enough financial support.

By Dan Morain

Los Angeles Times Staff Writer

December 7, 2007

A proposed initiative that drew national attention for its potential to affect next year's presidential election will not appear on the June ballot, organizers said Thursday.

Republican backers of the measure, which could have tilted the presidential contest toward the GOP nominee by changing how California awards electoral votes, conceded that they were unable to raise sufficient funds.

Sacramento consultant Dave Gilliard, the campaign manager, said that even if a financial angel were to shower the campaign with \$1 million, there was not enough time to qualify the measure for June.

"I was surprised that more people that finance these types of efforts didn't step forward," Gilliard said. "We had strong supporters and good supporters but didn't come anywhere close to making the budget."

Deadlines passed last week for submitting petitions to elections officials, who would have determined whether supporters had gathered the necessary 434,000 signatures of registered voters. Typically, gathering enough signatures costs about \$2 million; organizers must overshoot their mark to allow for invalid names.

Gilliard said proponents were holding out hope that the measure could appear on the November ballot with the presidential contest. But he said that was a dicey scenario: Even if it is on that ballot and wins voter approval, it might not affect the 2008 election.

The initiative might not kick in until 2012, Gilliard said — adding that courts likely would decide the matter.

The proposal would replace California's winner-takes-all system of appropriating its 55 electoral votes, awarding the votes instead by which candidate wins individual congressional districts.

Republicans hold 19 congressional seats in California, suggesting the GOP presidential candidate could win at least 19 electors here — almost the equivalent of Ohio's.

Democratic National Party Chairman Howard Dean has said Democrats could not win the White House without capturing all of California's electoral votes, which are more than 10% of the 538 electoral votes nationally and the biggest block of any state.

Although confident they could have defeated it, Democrats said they were relieved that the measure would not appear in June.

"This effort to rig the presidential elections demonstrates that the Republicans . . . recognize that they will be a minority party if they lose the White House and will do everything they can to hold on to power," said Democrat Chris Lehane, who helped organize the opposition.

He said Democrats plan to push alternative proposals in various states that would bypass the Electoral College altogether and elect presidents by a national popular vote.

The Electoral College measure first ran into trouble in October when the original proponent, Sacramento attorney Tom Hiltachk, abandoned the campaign. He and his team raised only \$175,000. After Hiltachk dropped the measure, Gilliard took it up, vowing to raise \$2 million and enlisting the support of Rep. Darrell Issa (R-Vista), a longtime client.

Issa donated \$100,000, the California Republican Party gave \$150,000, and the Lincoln Club of Orange County, an organization of Republican contributors, chipped in \$75,000. Several other Republican stalwarts gave four- and five-figure checks. But donations totaled about \$1.3 million, well short of the mark.

"Raising money is proving to be a lot more difficult than was anticipated," Gilliard said.

Republican Gov. Arnold Schwarzenegger had expressed skepticism about the measure. And Democrats had mounted an aggressive effort to block it, filing a complaint with the Federal Election Commission alleging that backers of Republican candidate Rudolph Giuliani violated federal regulations by supporting the proposal.

New York hedge fund owner Paul E. Singer, one of Giuliani's largest fundraisers, had seeded the initiative with the original \$175,000 donation.

The Electoral College initiative is relatively simple. Backers had portrayed it as a way to make California's elections fair. Democrats denounced

it as an attempt to steal the 2008 presidential election.

By altering the California Elections Code to require that electoral votes be counted by congressional district, California would have joined just two other states, Maine and Nebraska, which have a combined nine electoral votes.

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